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Federal Communications Commission
Office of the SecretaryWRITTEN TESTIMONY OF FRANK HAWKINS

1. My name is Frank Hawkins. For fifteen years, from July 1993 until June 2008, I was employed by the National Football League (the "NFL" or the "League"), most recently as Senior Vice President – Business Affairs. In that role, I was involved in many aspects of the League's television business, including those of the NFL Network, a 24-hour cable and satellite network owned and operated by NFL Enterprises LLC ("Enterprises"). At various times, my duties included strategic planning, operations, legal advice, and supervising negotiations for carriage of the NFL Network by cable and satellite operators. Since July 2008, I have been a partner in Scalar Media Partners, LLC, a strategic consultancy serving companies in the media, entertainment, and sports industries.

2. I participated directly and indirectly in discussions with Comcast Cable Communications, LLC and its parent company, Comcast Corporation (collectively, "Comcast") with respect to NFL Network carriage between 2003 and 2008. Especially during 2005 and 2006, Comcast made clear its intense interest in acquiring a package of eight live NFL games – the centerpiece of the NFL Network's schedule – for its affiliated channel, Versus, as part of a strategy to increase the viewership of (and, thereby, the value of) that channel. Soon after the NFL informed Comcast that it would not license that package to Versus, Comcast moved the NFL Network from a broadly distributed programming tier (a digital basic tier known as "D2") to a premium tier received by only a small fraction of Comcast's subscribers. At the same time, it kept Versus, which generates lower ratings than the NFL Network, on analog expanded basic, a tier that is distributed much more broadly than D2. Like other "expanded basic" or "digital basic"

tiers, Comcast's analog expanded basic tier contains a wide variety of channels appealing to a broad range of viewers; it includes sports-only channels focused both on coverage of single sports and on coverage of multiple sports. The threat of this move had been signaled by a number of comments by Comcast executives during the negotiations.

3. Comcast's action had the effect of undermining the NFL Network's ability to compete for viewers, advertisers, and programming, while at the same time advantaging Versus and another Comcast-affiliated sports network distributed on analog expanded basic, the Golf Channel. Both of these Comcast-affiliated sports networks compete with the NFL Network. Comcast continued to carry its affiliated sports channels on its analog expanded basic tier and (because the channels on the analog expanded basic tier are included in higher – *i.e.*, more expensive – general programming tiers) on D2 and nearly all of its other broadly distributed tiers.

4. Thus, Versus was included in a programming tier that the vast majority of Comcast's subscribers were required to purchase, while subscribers interested in seeing the NFL Network were required to pay a substantial fee each month – in addition to their basic service fees for their broad “basic” packages – to receive the premium tier. This differential treatment by Comcast – and, in particular, the sharp reduction in the number of Comcast subscribers who had access to the NFL Network – in turn made it more likely that programming licensors would license football programming rights to Comcast's affiliate Versus than to the NFL Network in the future.

The NFL Network

5. Enterprises launched the NFL Network in 2003 with a schedule of popular and community-oriented football programming to consumers throughout the country. The NFL Network supplements the core of the NFL's television efforts –

making games available via free broadcast television – by providing 24/7 football content that broadcast networks cannot economically offer. The NFL Network has earned five Sports Emmy awards in its four-plus year history, including a 2007 Sports Emmy for *America's Game: The Super Bowl Champions*, a 40-episode original series. During the 2008 NFL season, the NFL Network offered 54 pre-season live and tape-delayed games in addition to a package of eight live regular-season games (the “Eight-Game Package”). According to the League’s most recent statistics, the NFL Network is currently delivered to approximately 36 million homes nationwide.

6. NFL programming is extremely popular; it is far more popular than the programming carried on Comcast’s affiliates Versus and the Golf Channel. Live games are obviously the most popular NFL programming – eight of the ten most-watched cable television programs in the past twenty years have been NFL games, including the December 3, 2007 New England Patriots-Baltimore Ravens game, which attracted a record 17.5 million viewers – but non-game programming is popular as well. For example, the nation’s most popular sports network, ESPN, historically is among the ten most heavily viewed cable channels only during the months of the year when it telecasts both NFL games and other current NFL programming (e.g., NFL Matchup, NFL Live, NFL Sunday and Monday Countdown, and NFL-focused SportsCenters on Sunday and Monday Nights). ESPN’s telecast of the NFL Draft in April regularly out-rates ESPN’s April NBA game coverage.

7. The NFL Network has entered into carriage agreements with more than 240 multichannel video programming distributors (“MVPDs”), the vast majority of

which do not own national sports channels. Most of these MVPDs carry the NFL Network on programming tiers that are broadly distributed.

8. Enterprises also offers some NFL Network programming through alternative distribution methods that supplement, but do not replace, television-based viewing. For example, Verizon FiOS customers who subscribe to NFL Network can watch certain NFL Network programming on their computers. Enterprises also promotes NFL Network by making available on the NFL's website, NFL.com, 30-second clips of NFL Network programming.

Comcast's Historic Carriage of the NFL Network

9. Beginning in 2004, Comcast, the nation's largest cable operator, carried the NFL Network on its systems on a digital basic programming tier known as "D2." In exchange for the right to carry the NFL Network, Comcast paid

Comcast carried the NFL Network in this manner until the summer of 2007, at which time at least 8.6 million Comcast customers subscribed to the D2 tier.

10. For most of the period that Comcast carried the NFL Network on the D2 tier, the NFL Network did not carry the live, regular-season NFL games that it now offers. Based on the historical experience of cable television networks that have added NFL game packages in the past, I would expect the addition of live games to make a network more, not less, attractive to distributors.

Comcast's Historic Carriage of Versus and the Golf Channel

11. Comcast generally carries two of its affiliated sports-only channels – Versus and the Golf Channel – on an analog expanded basic programming tier purchased by the large majority of Comcast's 24.2 million subscribers. The channels in Comcast's analog expanded basic tier are received by virtually all of Comcast's subscribers other than those who receive only the "lifeline" package of local broadcast stations, PEG channels, and a small number of other program channels.

12. In its Answer in this proceeding (at page 62), Comcast stated that its analog expanded basic tier is received by "approximately 82-84% of Comcast's total subscribers." If so, between 19.8 million and 20.3 million Comcast subscribers receive its affiliated channels Versus and the Golf Channel. In contrast, as I explain below, only about 2.1 million Comcast subscribers now receive the NFL Network.

Competition Between the NFL Network and Versus and the Golf Channel

13. Like the NFL Network, Versus and the Golf Channel primarily target men aged 18 to 49, but they do so with programming focusing on sports that are markedly less popular than professional football. *See Exhibit 137.* Recent ESPN Sports Poll data (Exhibit 177) indicate that 70.6 percent of Americans 12 and older consider themselves NFL fans, and half of those consumers call themselves "avid" football fans. Indeed, 24 percent of Americans identify NFL football as their favorite sport; no other sport comes close to this level of popularity. By comparison, less than 3 percent identify professional hockey (Versus' most popular sport) as their favorite, and only about 1 percent cite professional golf. *See id.*

14. Similarly, NFL Network programming – including both game and non-game programming – is consistently more popular than the programming of Versus

and the Golf Channel. The NFL Network's average all-day, year-round (November-to-October) ratings were 0.16 during between November 2006 and December 2008. By contrast, the Golf Channel earned only 0.09, and Versus earned only 0.10. That is similarly true for prime-time ratings, where over the same two-year period the NFL Network averaged ratings of 0.31, while those of the Golf Channel and Versus were 0.13 and 0.21, respectively. *See* Exhibit 145.

15. The NFL Network's highest-rated programming receives higher ratings than the highest-rated programming offered by Comcast's competing sports affiliates. Between January 1, 2003 and December 31, 2008, the Golf Channel's highest rated program was the February 24, 2008 telecast of the WGC Accenture Match Play Championship, in which Tiger Woods earned his third title. If that event had been carried on the NFL Network (which was first Nielsen rated on October 30, 2006), it would have been the NFL Network's 44th most highly rated program. Put differently, 43 programs on the NFL Network had higher ratings in the last two years than the Golf Channel's top program in the last six years; and many programs on the NFL Network – including programs other than live NFL games – had *much* higher ratings. *See* Exhibits 173, 174, 175.

16. Versus' highest rated event for its most popular sport (hockey), Game Two of the 2008 NHL Stanley Cup Finals, would have been ranked 38th on the NFL Network. Versus' other programming also underperforms the NFL Network. For example:

- Cagefighting: Versus' most popular broadcast of World Extreme Cagefighting ranked fifth of all of Versus' programming during this period, earning a 1.53 rating; the equivalent rating would have resulted in a ranking of 46th on the NFL Network.

- Cycling: Versus' July 24, 2005 broadcast of the Tour de France received a 2.08 rating; that broadcast would have been ranked as the 35th most highly rated program if it had aired on the NFL Network. Versus' most highly-rated cycling event during the period since Nielsen began rating the NFL Network in 2006 was its July 15, 2007 Tour de France broadcast. That broadcast earned a 0.66 rating, the equivalent of the 137th to 141st-ranked NFL Network programs.
- Bull Riding: Versus' most heavily watched bull riding event, broadcast on May 1, 2005, earned a 0.78 rating. This rating equates to a 99th to 105th ranking on the NFL Network.

Eight-Game Package Negotiations

17. In mid-2004, shortly before it began carrying the NFL Network, Comcast began to solicit from the NFL a license to telecast a newly-created package of live, nationally-telecast NFL games on Versus (then known as the Outdoor Life Network). By creating a new package for national cable distribution, the NFL sought to increase from 92 to 95 the number of regular-season games available annually to a national audience; some of these games had previously been telecast only regionally. The NFL intended that these games be carried nationally on cable as well as on free, over-the-air broadcast television in the participating teams' home markets. (Based on longstanding policy, League games are available on free, over-the-air television in participating teams' home markets except when a home game is not sold out 72 hours before kickoff.) The NFL sought by this arrangement to increase the number of games that fans could watch over the course of a week and enable fans to view games involving teams other than their home team (including games involving rival teams, which may be important to the chances of their favorite teams to make the play-offs).

18. Although the NFL did not agree to license live games to Comcast in 2004, Comcast continued to express an interest in the package throughout 2005. In December of that year, the NFL received a proposal from Comcast that included as one

of its elements a proposal to pay

in exchange for carriage of the Eight-Game Package on its Versus channel. In connection with this proposal, Comcast confirmed that acquisition of such content would allow it to expand distribution of Versus and to increase the fees that it charged other cable and satellite operators for that channel.

19. In support of this proposal, Comcast CEO Brian Roberts met with the NFL's Broadcast Committee, Commissioner Tagliabue, and several other executives, including myself, on December 15, 2005 to describe his company's plans for the Eight-Game Package. At this meeting, Mr. Roberts described his view that companies that own valuable content generate higher "multiples" (of earnings) in their stock prices than companies that own only cable or other distribution systems. The acquisition of the Eight-Game Package, Mr. Roberts explained, would also enable Comcast to change market perceptions of its company so that it would no longer be seen only as a distributor but would now have an additional perceived principal role as a content company. Mr. Roberts predicted that this move could increase Comcast's market capitalization by approximately .

20. Comcast CEO Brian Roberts also met with then-NFL Commissioner Paul Tagliabue and others from the NFL, including myself, on January 24, 2006. At the meeting, Commissioner Tagliabue told Mr. Roberts that the NFL was not inclined to license the Eight-Game Package to Comcast. Mr. Roberts expressed his frustration with this tentative conclusion. He threatened that, if the NFL did not license the package to Versus, Comcast would drop the NFL Network from the "D2" tier and shift it to an

undesirable premium sports tier delivered to just a fraction of the Comcast households that then received the NFL Network.

21. Following the January 24 meeting, the NFL determined that Enterprises would telecast the Eight-Game Package on the NFL Network. The NFL chose this course of action in the hope of both meeting its goal of increasing the number of nationally telecast games and of increasing the reach and impact of the NFL Network as a fan development tool.

Comcast's Decision to Drop the NFL Network from the Digital Basic Tier

22. In September 2006, shortly before the Eight-Game Package was to begin airing on the NFL Network (and while Enterprises was engaged in carriage discussions with numerous other MVPDs), Comcast stated publicly that it intended to drop the NFL Network from the D2 tier (which then had 8.6 million subscribers) and place it on a premium sports tier, which had fewer than a million subscribers – only a small fraction of the viewers who received the NFL Network on the D2 tier. Comcast announced that this decision would take effect on January 1, after the NFL Network's most popular programming had run.

23. Comcast's decision to drop the NFL Network from the D2 tier and move it to the premium sports tier was inconsistent with other MVPDs' reactions to the NFL Network's addition of the Eight-Game Package, as well as the historical reactions of MVPDs to the addition of NFL games to cable channels. At a time when Comcast reduced the reach of the NFL Network on its systems, its peer MVPDs were expanding the NFL Network's distribution to their own subscribers. Specifically, the NFL Network's overall subscribership – excluding Comcast subscribers – increased by 7.5 percent between 2006 and the end of 2007, the year when Comcast tiered the NFL

Network. In contrast, over the first seven months of 2007, Nielsen reports that the Golf Channel's Universe Estimate (a representation of its total number of subscribers) grew by about two percent and that Versus' Universe Estimate grew by about three percent over the same period.

24. Enterprises sued Comcast for declaratory relief promptly after its tiering announcement because Comcast was barred by the parties' contract from shifting the NFL Network to the premium sports tier. Although the trial court initially found that Comcast was allowed under the contract to do so, its decision was reversed on appeal. That case remains pending.

25. Immediately after the trial court's order was released in May 2007, but before the appeal was completed and that decision was reversed, Comcast formally notified the NFL of its intent to shift the NFL Network to the premium sports tier.

26. During the period from approximately June 1, 2007, to July 15, 2007, Comcast followed through on its threat by dropping the NFL Network from the D2 tier and moving it onto Comcast's premium sports tier.

27. Comcast claimed in its Answer that its decision to drop the NFL Network from the D2 tier was intended to save its subscribers money. However, my understanding is that none of Comcast's D2 tier subscribers paid more when the NFL Network was added to the D2 package or when the Eight-Game Package was added to the NFL Network, and none of those subscribers received a reduction in his or her monthly fee as a result of Comcast's later decision to drop the NFL Network from that D2 tier. Although Comcast no longer had to pay Enterprises monthly license fees for its D2 tier subscribers, I do not believe that Comcast passed through its cost savings to its

subscribers in the form of a monthly price reduction. Instead, it is my understanding that Comcast continued to charge its D2 subscribers the same amount while the company reaped additional profit from both its D2 subscribers and its existing and new sports tier subscribers.

Impact of Tiering

28. Comcast's decision to drop the NFL Network from the digital basic tier immediately and adversely impacted the NFL Network. The NFL Network was originally available to about 8.6 million subscribers on Comcast's D2 digital basic tier; as a direct result of Comcast's action, it became available to only about 750,000 Comcast subscribers. In other words, the NFL Network lost approximately 90% of its Comcast subscribers over the few weeks that it took Comcast to move it to the premium tier, and its aggregate penetration dropped from over 42 million to just under 36 million subscribers. Enterprises was forced to increase its marketing expenditures significantly in an effort to compensate for this drop in distribution.

29. In order to continue to receive the NFL Network, Comcast subscribers were required to pay an extra monthly fee of about \$7, according to Comcast's website, in addition to the amount that they already paid Comcast for a monthly subscription to one of Comcast's broadly distributed digital tiers. *See Exhibit 176.* This results in a premium of about 16% over the standard fee for digital basic cable service. It is also my understanding that, in at least some Comcast markets, subscribers must buy a higher and more expensive digital tier to be eligible to purchase the premium sports tier that includes the NFL Network. Based on industry data on "wholesale" per-subscriber rates charged by cable channels, the NFL estimated that, after subtracting the license fees paid to programmers, Comcast generated a profit of about \$4.75 per month – 68% of that \$7

price – for each sports tier subscriber. In addition, since the NFL Network was placed on the premium sports tier, the tier's subscribership has increased by about 1.4 million households to about 2.1 million, thereby increasing Comcast's profits.

30. Although Comcast moved the NFL Network to its premium sports tier, it continued to carry its own national sports channels, Versus and the Golf Channel, on nearly all of its broadly distributed tiers, including its lowest analog expanded basic tier. That tier must be purchased by any of Comcast's 24.2 million analog and digital subscribers who want programming beyond the "lifeline" and broadcast channels. This gave Versus and the Golf Channel an immediate 15-to-1 advantage, in terms of Comcast subscribers reached, over the NFL Network. If the NFL Network were carried on the same expanded basic tier, it would have approximately 54 million total subscribers.

31. The abrupt reduction in households in which the NFL Network could be viewed prevented the NFL Network from obtaining other desirable sports content for which it competed. This is because owners of certain sports content, including content for which Versus and Enterprises directly competed, frequently require a minimum household penetration for the award of such rights. For example, the loss of subscribers prevented Enterprises from effectively competing for carriage of a Pac-10/Big 12 Conference college football game package that was available for sublicense in June 2007 (just as Comcast's tiering of the NFL Network was beginning), which had a minimum penetration requirement of 50 million households. The package was awarded to Versus.

32. Similarly, the reduced audience "reach" resulting from Comcast's conduct has undermined the NFL Network's ability to secure advertising rates commensurate with the Network's high ratings. Advertisers commonly use 50 to 60

million subscribers as the minimum threshold for treating a channel as "national." The NFL Network has been unable to compete for many national advertising contracts because Comcast's discrimination reduced its reach to a level substantially below that threshold, even though the NFL Network is more highly viewed and rated in the households it reaches than are Versus and the Golf Channel in the households they reach.

33. Many NFL Network advertisers have reduced or eliminated their advertising spending as a result of the reduction in the NFL Network's subscribers. For instance, [redacted] reduced its spending on NFL Network advertising from [redacted] in 2006 to [redacted] in 2007. Similarly, [redacted] – which spent [redacted] on NFL Network advertising during 2006 – cut its NFL Network advertising entirely in 2007, citing "lower than promised distribution" as one basis for its decision.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2009.


FRANK HAWKINS